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Environmental destruction from mining in Central America and investment protections under the DR-CAFTA.

PRESENTATION AT CONGRESSIONAL BRIEFING: ECONOMIC UNDERPINNINGS OF MIGRATION IN THE AMERICAS, A CLOSER LOOK AT CAFTA-DR. September 10, 2014, 2226 Rayburn HOB

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I wish to thank you, Representative Marcy Kaptur, for organizing this briefing for such an urgent matter and for your continued solidarity with the people of Central America and Mexico. I am a Mexican national who has worked extensively on the impacts of NAFTA in Mexico, and because of that I also worked in Central America when the DR-CAFTA was being negotiated. Today, we can verify that our warnings on the crisis that the “free trade” agreement would bring to Central American people were, unfortunately, correct. Central America is facing a humanitarian crisis that has incited millions to migrate as economic and violence refugees, thousands of them children. And there is also an environmental crisis being provoked by ruthless mining corporations that are displacing many people from their rural livelihoods. Today, I want to talk about how the mining industry is protected by the rules on investment included in Chapter 10 of DR – CAFTA. During the last decade, the [metallic mining industry](#), in particular the gold industry has become very significant in Central America, in part because of the increase of prices (the price of gold has jumped more than 300% in the last two decades), the increase of demand (there is particularly a great increase in demand from China and India) and also because the [increased deregulation of environmental norms and the increased protection that free trade agreements](#) like the DR - CAFTA give to these companies.

According to Studies from [Central American organizations like CEICOM](#), 14% of the Central American territory is already authorized for mining. Honduras, Nicaragua and Guatemala are the countries with the most square kilometers of territory concessions and which have granted more mining concessions to companies, both national and transnational. The country with the largest number of concessions is Honduras. In territorial terms, it means almost 35% of the national territory. Guatemalans are warning that the total areas granted to mining companies are nearly 30% of their territory.

However, El Salvador and Costa Rica have different situations. These two countries are defending their environment and livelihoods from destructive mining practices. But they are being [punished for doing so under the rules of investment protection agreements](#).

Although 50 to 70% of the land authorized for mining in Central America is operated by Canadian companies, DR - CAFTA is being used by several U.S. and Canadian companies to sue governments directly at secret tribunals like the International Center for the Settlement of Investment Disputes (ICSID) hosted by the World Bank.

In El Salvador there are a total of 29 metallic mining projects, but luckily none of them are in the exploitation phase. This is thanks to community pressure defending the scarce watersheds of El Salvador and highlighting the fact that the mining company Pacific Rim hasn't complied with environmental requirements. For these efforts, the Salvadoran government has put a moratorium on mining.

In Costa Rica, in 2010, after a long campaign of awareness and national mobilization, the Legislative Assembly voted unanimously for a prohibition on open-pit mining, as well as the use of cyanide and mercury in mining activities.

At the same time, investor state suits over mining in Central American countries are increasing:

- The U.S. Company, Commerce Group, sued El Salvador for the closure of a high polluting mine, [but the case was dismissed in 2011](#) for lack of jurisdiction. However, El Salvador was forced to pay several millions dollars in fees for its defense.
- [Pacific Rim sued El Salvador](#) (ICSID Case No. ARB/09/12), the first mining case to be filed under the DR-CAFTA in Central America. Later, CAFTA claims were eliminated because the company couldn't prove it had sufficient activity in the U.S., but the suit continues under an outdated investment law of El Salvador.
- [Infinito Gold Ltd. has sued the Republic of Costa Rica](#) (ICSID Case No. ARB/14/5), for nearly 100 million dollars over disputes of gold mining under CAFTA.
- The [U.S. based Corona Materials has filed its notice of intent to sue the Dominican Republic](#), also claiming violations of CAFTA's Chapter 10. And of course investor state disputes under DR-CAFTA are not only related to mining. Other cases include:
- [TECO Guatemala Holdings, LLC \("TGH"\), a U.S. corporation](#), alleged that the Republic of Guatemala wrongfully interfered with its indirect subsidiary's investment in an electricity distribution company in Guatemala. TGH alleged a CAFTA-DR violation of Article 10.5 (minimum standard of treatment), and received \$21.1 million in compensatory damages and \$7.5 million in legal fees from Guatemala; this is in addition to costs and expenses incurred for the country's own defense.
- [The U.S. Railroad Development Corporation \(RDC\) sued Guatemala](#) and was awarded a total of \$11.3 million, where Guatemala had to pay RDC's and its own legal fees and expenses.
- [The Italian electricity consortium Enel](#) has filed a case against the Salvadoran State with the ICSID over a dispute on equity interest in the geothermal plant (under El Salvador's investment law).
- [Spence International Investments and others sued Costa Rica](#), under CAFTA at the UNCITRAL for Costa Rica's sovereign decision to expropriate land for a public purpose, the establishment of an ecological park.

As we have seen with [many investor-state cases under NAFTA](#)¹ countries all over the world, and in particular in Central America, are coming to realize the perniciousness of investor protection rules and Investor State Dispute Settlement mechanisms (ISDS).

What is really striking about the investment rules that allow investors to circumvent national judicial remedies and challenge nationally responsible public policies in what is called the "chilling effect" or more precisely the ["regulatory chill"](#).

This is why the resistance to the Trans Pacific Partnership (TPP) free trade and investment agreement is so important. Many governments are realizing that they, or their predecessor governments, signed these agreements only to now be handcuffed when they want to regulate to protect the environment. Take for example, the cases we are talking about against highly pollutive mining activities, like gold mining. To further emphasize the point, Guatemala hasn't been sued yet by a mining company but that is because the government hasn't affected their operations or tampered with their profiteering. Here are two cases to

make this point:

¹ Canada and Mexico have so far been the biggest losers in this scheme. Mexico has lost at least five disputes under Chapter 11, totaling more than US\$200 million in penalties. The government of Canada, meanwhile, has lost or settled five NAFTA Chapter 11 cases, totaling over US\$157 million in compensation paid to foreign companies but two pending cases amount to more than US\$750million.

- The Merlin Mine: The Guatemalan government reopened the mine, which the Interamerican Human Rights Commission had issued precautionary measures to be closed given its environmental and social impacts. Through a freedom of information request regarding the Government's deliberations and considerations that factored into its response, the Guatemalan government referenced (page 30) a potential investment arbitration as a reason to avoid suspending the mine; namely that closing the mine "could provoke Marlin, GoldCorp Montana, to activate the World Bank's ICSID or to invoke the clauses of the free trade agreement (CAFTA) to have access to international arbitration and subsequent claim of damages to the state".
- More recently, [the communities around San Jose del Golfo](#) — about 45,000 people — have engaged in a two-year long peaceful resistance to prevent the construction of a new mine by Kappes, Cassiday & Associates (KCA). Now the company is trying to reopen the mine's access road using blunt force of the PNC and army. Protesters estimate 95% of families in the region depend on agriculture, which would be destroyed if the water were further contaminated. [KCA has threatened to sue Guatemala if the mine is not opened](#). "They can't afford this lawsuit," a representative of KCA said. He said that "We had a big law group out of DC fire off a letter to the mine's minister, copied to the president, explaining what we were doing." The result is that the people of [San Jose del Golfo have been violently evicted from their lands](#) by military force.

To conclude, in these times of environmental destruction and the increase of environmental refugees from Central America, as we are sadly witnessing today with the displacement of tens of thousands of children from their families and communities, I believe it is time for a congressional investigation.

We must use these egregious investor-state cases to highlight excessive corporate power in the region. We must change trade and investment agreements to stop these excessive lawsuits that damage communities, the environment, and democracy. And we must work to help Central American people remain in their native land and regain their livelihoods lost to ruthless extractive projects like mining.

Thank you,

